

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 9th day of August, two thousand and six.

PRESENT:

HON. GUIDO CALABRESI,
HON. SONIA SOTOMAYOR,
HON. BARRINGTON D. PARKER,
Circuit Judges.

Guang Zhang Ye,

Petitioner,

-v.-

No. 05-6122-ag
NAC

Board of Immigration Appeals,

Respondent.

FOR PETITIONER:

Farah Loftus, Los Angeles, California.

FOR RESPONDENT:

David C. Iglesias, United States Attorney, District
of New Mexico, David N. Williams, Assistant
United States Attorney, Albuquerque, New Mexico.

UPON DUE CONSIDERATION of this petition for review of the Board of Immigration Appeals (“BIA”) decision, it is hereby ORDERED, ADJUDGED, AND DECREED that the

1 petition for review is GRANTED in part and DISMISSED in part, the BIA’s decision is
2 VACATED in part, and the case is REMANDED to the BIA for further proceedings consistent
3 with this order.

4 Guang Zhang Ye, through counsel, petitions for review of the BIA decision affirming a
5 decision of Immigration Judge (“IJ”) William Van Wyke, denying his claims for asylum,
6 withholding of removal and Convention Against Torture (“CAT”) relief. We assume the parties’
7 familiarity with the underlying facts and procedural history.

8 Where, as here, the BIA adopts and affirms the IJ’s opinion, this Court reviews the IJ’s
9 decision. *Twum v. INS*, 411 F.3d 54, 58 (2d Cir. 2005). We review the agency’s factual
10 findings, including adverse credibility determinations, under the substantial evidence standard.
11 *See* 8 U.S.C. § 1252(b)(4)(B); *Jin Hui Gao v. United States Att’y Gen.*, 400 F.3d 963, 964 (2d
12 Cir. 2005); *Zhou Yun Zhang v. INS*, 386 F.3d 66, 73-79 (2d Cir. 2004). Under 8 U.S.C. §
13 1158(a)(3) we lack jurisdiction to review the denial of asylum as time-barred. However,
14 substantial evidence does not support the IJ’s adverse credibility determination with respect to
15 the denial of withholding of removal relief.

16 First, the IJ erred in his determination that Ye failed to introduce evidence indicating that
17 the birth control office issued marriage certificates. The IJ was correct in noting that the
18 certificate did not mention the birth control office and only bore a “Marriage Registration Special
19 Seal of The People’s Government of LangQi, Rural District, FuZhou City.” However, the IJ
20 erred in concluding that Ye claimed to have received his marriage certificate from “the birth
21 control office.” In fact, Ye stated that he had received his marriage registration from “the family
22 planning board.” Although it may seem questionable for Ye to have received a marriage
23 certificate from a “birth control office,” it is not inherently implausible that a “family planning
24 board” would issue marriage registrations. The IJ, therefore, mischaracterized Ye’s testimony,

1 and improperly required Ye to present background evidence in support of that
2 mischaracterization.

3 _____Second, the IJ misstated Ye's testimony and the evidence in the record in finding a
4 discrepancy between: (1) Ye's assertions that his wife did not wish to have an IUD inserted
5 because "the couple wanted to have more children"; (2) Ye's claims that "he and his wife did not
6 intend to have more children during the time while he was in China"; and (3) the fact that Ye's
7 wife "took birth control pills . . . to prevent contraception." Although Ye testified that their
8 desire to have more children was one reason for their unwillingness to have an IUD forcibly
9 inserted, Ye's wife also stated that, after her involuntary abortion, she had gone into hiding to
10 escape the IUD insertion because she had been "afraid of that feeling of being forced."

11 Furthermore, Ye later testified that his wife did not wish to have an IUD inserted because "it
12 would be very uncomfortable," and "the doctors said that it's better, after the C-section . . . if you
13 don't have the [IUD] inserted . . . [for] [a]bout a year." Finally, Ye also testified that his wife's
14 doctor had "advised her that it would be best if she didn't get pregnant within a four or five year
15 period." Under these circumstances, it is not inherently unreasonable that Ye's wife resisted the
16 government's efforts to forcibly insert an IUD despite the fact that the couple wished to have
17 children after a period of years and planned to use oral contraception following their son's birth.

18 _____Third, the IJ improperly speculated that if there were "medical reasons why [Ye's wife]
19 should not use an IUD," then he saw "no reason to believe that the medical reasons could not
20 have been documented to the birth control office so that she could still be in compliance by
21 using, as she did, birth control pills." Ye testified that he had learned from his wife that birth
22 control officials would not allow a woman to take birth control pills in lieu of an IUD insertion.
23 It is not inherently implausible that, in its enforcement of family planning policies, birth control
24 officials would use certain types of birth control to the exclusion of others. The IJ's

determination in this regard was, therefore, speculative and based on assumptions unsubstantiated in the record.

_____. Fourth, the IJ misstated the record in concluding that although Ye had been in hiding for four years, he employed a snakehead from his home village, rather than one from where he had been in hiding. Ye, in fact, testified that he had used a snakehead that was *not* from his home village, and that he contacted the snakehead through his family. Ye then stated that he did not use a snakehead from the town in which he had been hiding, because he was “not very familiar with the area, so [he] was afraid of being cheated.” It is, of course, plausible that Ye would contact a snakehead through people he knew and trusted.

Fifth, the IJ misstated Ye’s testimony by stating that Ye had worked continuously in a construction job for a year. The IJ found this testimony indicated that Ye “was not really in ‘hiding’ and not in the area where he said that he was, but rather [was] going about doing his construction work without fear of the government.” Ye did not testify to having worked in construction, nor did he testify to having worked continuously in one job for a year. Instead, Ye stated that while he and his wife were in hiding he was “was always out on the sea fishing,” and was “working all different places.” Furthermore, it is not inherently implausible that Ye was in hiding, in a town away from his home village, and still working. The IJ’s adverse credibility determination in this regard was, therefore, not supported by substantial evidence.

Sixth, the IJ erred by stating, “[i]t certainly seems odd that [Ye] should make a point of receiving the marriage license on the very day that his wife [wa]s suffering an abortion against her will.” In his decision, the IJ makes it seem as though Ye traveled to the marriage license office after his wife was taken away for an abortion. However, the IJ’s statement confuses the testimony. Ye’s testimony and asylum application indicate that, upon arriving at the office to receive the marriage registration, Ye’s wife was forcefully taken away for an abortion, while Ye

1 was detained at the office. It is not implausible that the office, which the couple had visited for
2 purposes of obtaining their marriage registration, would then issue Ye a marriage registration.

3 _____Finally, the IJ erred in determining that Ye's testimony was incredible because Ye
4 equivocated when asked how old his wife had to be in order to get married. The IJ stated that it
5 seemed "unlikely that somebody living in the environment so coercive as that . . . would not
6 know how old his wife needed to be" for purposes of marriage registration. The transcript does
7 not indicate that Ye was asked how old his wife had to be in order to be married, or that he ever
8 gave a such a response. The record does, however, when questioned as to the required age for
9 marriage, Ye testified that he thought that *he* had [to] be twenty-five years old. Thus the IJ
10 mischaracterized this portion of Ye's testimony as well.

11 Although there are other bases on which the IJ reasonably rested his adverse credibility
12 finding, remand is necessary because we cannot state with confidence that the agency would
13 adhere to its decision in the absence of flaws. *See Xiao Ji Chen v. U.S. Dep't of Justice*; 434
14 F.3d144, 161 (2d Cir. 2006).

15 Much of the above erroneous analysis by the IJ took place as part of the IJ's denial of
16 Ye's asylum claim, which we do not have jurisdiction to review since the IJ also found it to be
17 time barred. (The agency is of course, free to reconsider the one-year issue in view of our
18 credibility findings, should it wish to do so.) The IJ, however, based his denial of withholding of
19 removal on the same improper adverse credibility determination. Therefore, this denial was
20 improper as well. In his brief to this Court, Ye fails to challenge the IJ's denial of his CAT
21 claim. His CAT claim is, therefore, abandoned. *See Yueqing Zhang v. Gonzales*, 426 F.3d 540,
22 542 n.1, 546 n. 7 (2d Cir. 2005).

23 Accordingly, Ye's petition for review is DISMISSED in part, with regard to the IJ's one-
24 year filing deadline determination, and GRANTED in part with regard to the IJ's withholding of

1 removal finding. The BIA's decision is VACATED in part for the foregoing reasons, and the
2 case is REMANDED to the BIA for further proceedings consistent with this order. Having
3 completed our review, any stay of removal that the Court previously granted in this petition is
4 VACATED, and any pending motion for a stay of removal in this petition is DENIED. Any
5 pending request for oral arguments is DENIED in accordance with Federal Rule of Appellate
6 Procedure 34(a)(2), Second Circuit Local Rule 34(d)(1).

7
8 FOR THE COURT:
9 Roseann B. MacKechnie, Clerk

10 By: _____
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